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Municipal Liability under Section 1983 of the Civil Rights Act

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CONCLUSION

Although existing statutes and court decisions grant to the mentally ill: the right to counsel, the right to independent expert examinations, the right to the privilege against self-incrimination, proof beyond a reasonable doubt, and the right to trial by jury; these privileges are often abused by indifferent parties. Contemporary lawyers have an obligation to make sure that the mentally ill are accorded those rights deserving them.

LABAT YANCEY

Municipal Liability Under Section 1983 of the Civil Rights Act

Local administrative and governmental units of the several states in recent years have found themselves party defendants in litigation involving alleged violations of § 1983 of the Civil Rights Act.[1] Most cases have been concerned with school desegregation,[2] discrimination in hiring or firing by local school boards,[3] denial of due process,[4] and police brutality in which the plaintiffs seek to hold the city or county ultimately liable.[5]

Whether these public entities are proper defendants, and if so, for what forms of relief is one of the most unsettled technical problems in such litigation.

The Supreme Court of the United States in an opinion by Justice Rehnquist[6] has attempted to settle the issue in its recent decision of the *City of Kenosha v. Peter G. Bruno*.[7]

The issue has been whether the word "person" in § 1983 of the Civil Rights Act includes a municipality, or governmental agency, or unit thereof for legal or equitable relief. The Supreme Court in *Bruno* stated an emphatic "no!"

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[1] 42 U.S.C. § 1983 (1964) provides:

> Every person who under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[2] Wheeler and Spaulding v. Durham City Board of Education No. 5, Civil Nos. D-60 and C-116-D-60 (M.D.N.C.).

[3] *Harkless v. Sweeney, Ind. School Dist.*, 300 F. Supp. 794 (S.D. Tex. 1969), *rev'd* 427 F.2d 319 (5th Cir. 1970), *cert. denied* 91 S.Ct. 451 (1971).

[4] *City of Kenosha, Wisconsin v. Peter G. Bruno* 93 S.Ct. 2222 (1973).

[5] *Carter v. Colson* 477 F.2d 358 (D.C. Cir. 1971).

[6] For connotation of this statement see Washington, Essays in Repression: First Term Opinions of Mr. Justice Rehnquist, 4 N.C.C.L.J. 53 (1972).

[7] 93 S.Ct. 2222 (1973).

This article will attempt to analyze the effect of the *Kenosha v. Bruno* decision with respect to the history of the enactment of § 1983 of the Civil Rights Act, and the early Supreme Court interpretation of the act as it related to municipal liability in *Monroe v. Pape*.[8] It will also look at the Federal Courts' attempt to evade the seemingly harsh effect of Monroe by formulating the bifurcated remedy which in the author's opinion led to the Bruno decision.

SECTION 1983

What is known today as 42 U.S.C. § 1983 is an emasculated remnant of the Sherman Amendment[9] to the Ku Klux Klan Act.[10] The statute was enacted in 1871 to protect the newly declared rights of Blacks of which no white man up to that time had found himself bound to respect.

The Sherman Amendment was rejected and a more acceptable version was enacted. The controversy over the rejection did not center on the debate of whether a municipality was a "person" but as one author asserted "was a vigorous opposition to imposition of damage liability, similar to the "riot liability" which existed in some states upon any city

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[8] 365 U.S. 167(1961).

[9] CONG. GLOBE, 42d Cong., 1st sess. 663, 749 (1871). The first version provided:

> That if any house, tenement, cabin, shop, building, barn, or granary shall be unlawfully or feloniously demolished, pulled down, burned or destroyed, wholly or in part, by any persons riotously and tumultuously assembled together; or if any person shall be unlawfully and with force and violence be whipped scouraged, wounded, or killed by any persons riotously and tumultuously assembled together; and if such offense was committed to deprive any person of any right conferred upon him by the Constitution and laws of the United States or to deter him or punish him for exercising such right, or by reason of his race, color, or previous condition of servitude, in every such case the inhabitants of the county, city, or parish in which any of the said offenses shall be committed shall be liable to pay full compensation to the person or persons damnified by such offense if living, or to his widow or legal representative if dead; and such compensation may be recovered by such person or his representative by a suit in any court of the United States of competent jurisdiction in the district in which the offense was committed to be in the name of the person injured, or his legal representative, and against said county, city, or parish. And execution may be issued on a judgment rendered in such suit and may be levied upon any property, real or personal, of any person in said county, city, or parish, and the said county, city or parish may recover the full amount of such judgment, costs, and interests, from any person or persons engaged as principal or accessory in such riot in an action in any court of competent jurisdiction.

A second version of the act modified the government's liability:

> And any payment of any judgment, or part thereof unsatisfied, recovered by the plaintiff in such action, may, if not satisfied by the individual defendant therein within two months next after the recovery of such judgment upon execution duly issued against such individual defendant in such judgment, and returned unsatisfied, in whole or in part be enforced against such county, city, or parish, by execution, attachment, mandamus, garnishment, or any other proceeding in aid of execution or applicable to the enforcement of judgments against municipal corporations; and such judgment shall be a lien as well upon all moneys in the treasury of such county, city, or parish, as upon the other property thereof. And the court in any such action may on motion cause

or county in which citizens were subjected to racial violence, even if the offending parties were not employees of the political subdivision."[11]

The act was aimed at public officials who procrastinated in their duty to enforce the laws against the Klan for attacks on Black citizens. Sherman's Act would have prompted such enforcement by a threat of assessment against the city, county, or parish in which the harm occurred at the hands of racists. Senator Stevenson voiced his opposition to the amendment on grounds that it made no mention of direct liability for an omission of a corporate duty but sought to hold the municipalities liable for personal injuries that were unforeseen or that could have been prevented by reasonable conduct. The amendment according to Stevenson was unconstitutional and would destroy municipal governments of every city and county.

Stevenson protested that not only could the plaintiff recover every dollar in the city treasury but also could sell the city hall, courthouse, and for that matter the jailhouse to satisfy his judgment.[12]

With this historical backdrop and the official rejection of the Sherman Amendment and opposition comments thereto on record, the Supreme Court was confronted with its first construction of the act as it related to municipal liability.

MONROE V. PAPE[13]

In *Monroe v. Pape* the complainant, a resident of Chicago, alleged that thirteen Chicago police officers broke into his home in the early morning, routed him and his family from bed, made them stand naked in the living room while the officers proceeded to ransack the complainant's apartment. The officers had no search warrant and after not finding what they were looking for, jailed the complainant on open charges and for ten hours grilled him about a two-day-old murder. Among other violations, the complainant was not taken before a magistrate, though one was accessible, nor was he permitted to call his family. The complainant was subsequently released without ever knowing what he had done and in fact no criminal charges were ever preferred against him.

Monroe's action was based on 42 USC § 1983 which gave an individual a right of action against every "person" who, under color of any statute,

additional parties to be made therein prior to issue joined, to the end that justice may be done. And the said county, city, or parish may recover the full amount of such judgment, be it paid, with costs and interest, from any person or persons engaged as principal or accessory in such riot, in an action in any court of competent jurisdiction. And such county, city, or parish, so paying, shall also be subrogated to all plaintiff's rights under such judgment.

[10] Civil Rights Act of 1871, Ch. 22, 17 STAT. 13.

[11] See, Liability of Public Entities under Section 1983 of the Civil Rights Act, 45 S. CAL. L. REV. 133 (1972).

[12] CONG. GLOBE, *supra* note 9, at 762.

[13] 365 U.S. 167 (1961).

ordinance, regulation, custom, or usage, of any state, subjects another to the deprivation of such rights, privileges, or immunities.

The City of Chicago moved to dismiss the complaint on grounds that it was not liable under the Civil Rights Act, nor was it liable for acts committed in performance of its governmental duties. The thirteen police officers moved that the action be dismissed on grounds that the plaintiff had alleged no cause of action under § 1983 or under the Constitution. The District Court agreed to dismiss and the Court of Appeals affirmed. The Supreme Court granted certiorari.

It was argued by the City of Chicago that "under color of law" in the statute (1983) excluded acts of official police officers who could show no authority to act as they had; that such conduct violated the constitution of Illinois and that the plaintiff had an adequate state remedy which he had not exhausted.

The court held that the plaintiffs had a cause of action against the police officers and that exhaustion of a state remedy was not a prerequisite to utilization of § 1983. The Court stated that the Act applied to acts committed under color of state law as well as those committed outside of the law. However, the court agreed with the District Court and Appeals Courts that a municipality is not a "person" as contemplated by § 1983. 1983.

In reliance on the Congressional Records discussed earlier, the Court held that "the response of the Congress to the proposal to make municipalities liable for certain actions being brought within federal purview by the act of April 26, 1871 was so antagonistic that we cannot believe that the word "person" was used in this particular act to include them."[14]

The plaintiff had raised the act of February 25, 1871, entitled "An Act prescribing the forum of the enacting and resolving clauses of acts and resolutions of Congress, and Rules for the construction thereof." Section 2 of this Act provided that the word "person" extended and applied to "bodies politic and corporate." Justice Douglas in the Monroe decision ignored this Act by simply referring to it as a permissive definition rather than a mandatory one.[15]

The court did not decide the issue of whether municipalities were proper defendants where only equitable relief was sought in violation of § 1983. The Court simply noted that some cases had held municipalities proper defendants in seeking equitable relief,[16] but stated that the issue was not "raised in the present case." It further added "that since the court had already held that a municipality is not a person within the meaning of § 1983, no inference to the contrary can any longer be drawn from those cases."[17]

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[14] *Id.* at 192.

[15] *Id.* at 191.

[16] Douglas v. Jeanette 319 US 157, 87 LEd 1324, 63 S.Ct. 877, 882 (1943). Holmes v. Atlanta 350 US 879, 100 LEd 776, 76 S.Ct. 141.

[17] 365 US 167 (1961).

FEDERAL DECISIONS AND THE MONROE HOLDING

The federal courts had until the Bruno decision (to be discussed later), limited Monroe to its *ratio decidendi* despite the broad language of the Supreme Court that municipalities were excluded from liability under § 1983.

The federal courts had until the Bruno decision limited Monroe to its holding despite the broad language of the Supreme Court that municipalities were excluded from liability under § 1983.
§ 1988 provides that where federal law is deficient in providing a remedy for constitutional violations, the law of the forum state shall govern. remedy for constitutional violations, the law of the forum state shall govern. The federal courts also held that Monroe did not apply where local law had abolished sovereign immunity.

In *Dailey v. Lawton*,[19] the plaintiff, a potential renter of a corporation proposing to build a low income housing development in a predominantly white residential section of Lawton, Oklahoma and the corporation itself, brought suit under 42 U.S.C. § 1983 to enjoin the city of Lawton from denying the corporate plaintiff a building permit and refusing to grant to such plaintiff a request for a zone change. The court held that a city is a "person" within the meaning of § 1983 with respect to actions for injunctive relief.

The court in Dailey read footnote 50 of the *Monroe v. Pape* decision to "differentiate between actions for damages and action for equitable relief and as intending no bar to equitable actions for injunctive relief against invasions of a plaintiff's federal constitutional rights by municipal action."[20]

In *Harkless v. Sweeney Independant School District*,[21] an action by Black school teachers against the school district and against the trustees and superintendant of the district in their official capacities was brought under § 1983 alleging violations of the teachers' civil rights for failure to renew their contracts when the school system was desegregated. (Seventeen

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[18] The jurisdiction in civil matters conferred on the district courts by the provisions of this chapter and title 18, for the protection of all persons in the United States in their civil rights and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified changed by the constitution and statutes of the state wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and if it is of a criminal nature, in the infliction of punishment on the party found guilty. 42 U.S.C. § 1988 (1964).

[19] 425 F.2d 1037 (10th Cir. 1970).

[20] *Id.* at 1038.

[21] 427 F.2d 319 (5th Cir. 1970).

of the school district's 25 black teachers were not rehired). The District Court had relied on the language in footnote 50 of the Monroe decision in dismissing the plaintiffs' action. The appeals court held,

> "we do not read footnote 50 so broadly. We read it within the context of the holding of the court and the text to which it is appended. We think the court was saying in the footnote that the issue of damages against municipalities under respondeat superior was a question not raised in the equitable relief cases cited and that no inference may be drawn from those cases that a municipal corporation is a person within the meaning of § 1983 for the purposes of a damage claim against it under respondeat superior. We do not perceive that the court was expanding its holding by a footnote dictum to eliminate municipalities as "persons" under § 1983 for the purposes of equitable relief, a question not expressly considered in the cited equitable relief cases."[22]

In the case of *Garren v. Winston-Salem*,[23] the plaintiffs, nonresident landowners, brought an action against the city of Winston-Salem, North Carolina for declaratory and injunctive relief when the city decided to locate a sanitary landfill (garbage dump) in proximity to their property. The issue pleaded was: that statutes authorizing exercise of extraterritorial zoning powers by Winston-Salem deprived the plaintiffs of the equal protection of the laws by subjecting them to zoning powers of the board of aldermen while denying them the right to vote in aldermanic elections. (Plaintiffs held property in the extra-territorial zoning area and outside city limits). The Court held that for purposes of declaratory or injunctive relief § 1983 may be invoked against a municipality.

Other federal courts had reached a determination that a municipality is a "person" under 42 USC § 1983 where local or state law had abolished sovereign immunity. In the case of *Carter v. Carlson*,[24] Carlson, a police officer, in the District of Columbia arrested Carter without probable cause and beat him severely with brass knuckles. Carter brought an action against the precinct captain, the chief of police, and the District of Columbia on grounds that they had failed to train the officer in the proper execution of an arrest and that he, Carter, had been deprived of his constitutional rights.

The Court of Appeals of the District of Columbia limiting Monroe to its specific facts, stated that it was not controlling in this case because local common law held the municipality liable for the misconduct of its agents and employees. In an earlier case the District of Columbia had abolished sovereign immunity for all but discretionary acts.[25] The Court further

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[22] *Id.* at 322.

[23] 439 F.2d 140 (1971), vacated on other grounds 405 US 1052, 31 L.Ed. 2d 787, 92 S.Ct. 1489 *and later app.* 463 F.2d 54, *cert. denied.* 409 US 1039, 34 LEd 2d 488, 93 S.Ct. 519 (1971).

[24] 447 F.2d 358 (D.C. Cir. 1971).

[25] *See* Spencer v. General Hosp., 425 F.2d 479 (D.C. Cir. 1969).

pointed out that the argument that led to the rejection of the Sherman Amendment did not preclude the states or local governments from abolishing sovereign immunity nor did the dictum in Monroe preclude this. The Court stated further that it could adopt § 1988 of the United States code to give full relief under 1983 where the local government had abolished sovereign immunity.[26] In addition to the above reasoning was the fact that the District of Columbia unlike other municipalities was governed by congressional authority at the time of *Carter*.

Prior to the decision in Carter the lower federal courts were reluctant to incorporate local laws abolishing sovereign immunity to give the plaintiffs full redress of his injury. In some cases the courts relied on the dictum in Monroe.[27] Others felt that abolishing sovereign immunity was of no consequence since the Supreme Court had held that § 1983 did not apply to municipalities.[28]

In the case of *Ries v. Lynskey*,[29] the Seventh Circuit refused to allow a municipality to be susceptible to suit on grounds that the municipality had not lost its sovereign immunity simply because the alleged misfeasant police officers had not been identified. Ries had received injury in 1968 at the Democratic National Convention in Lincoln Park at the hands of an unidentified Chicago police officer. Ries claimed he could not see the officer who assaulted him on account of darkness and that officers at that time wore gas masks.

In *Moor v. Madigan*,[30] a proceeding was brought against the Sheriff's Department of Alameda County, California alleging that the plaintiffs had received injuries at the May 1969 "People's Park" disturbance or riot at the hands of several deputy sheriffs on duty at the time of the altercation. California law permitted imposition of vicarious liability against local governing units. The courts held that if the appellants were allowed to enforce the state-created municipal liability in the district court under § 1988, they would achieve a result which could not be reached through § 1983, under *Monroe* and *Brown*. This alone, according to the court precluded application when the result would be inconsistent with the laws of the United States.

CITY OF KENOSHA, WISCONSIN, ET. AL. V. BRUNO ET. AL.

At the time that the Supreme Court decided Bruno,[31] the federal courts had created several theories to evade Monroe's broad language

[26] 42 U.S.C. § 1988 (1964).
[27] *See* Wilcher v. Gain 311 F. Supp. 754 (N.D. Calif. 1970).
[28] *See* Brown v. Town of Caliente 392 F.2d 546 (9th Cir. 1968).
[29] 452 F.2d 172 (7th Cir. 1971).
[30] 458 F.2d 1217 (9th Cir. 1972).
[31] 93 S.Ct. 2222 (1973).

that a municipality is not a "person" under § 1983. The federal courts distinguished between money damages, and non-money damages, denying recovery on the former and granting wide and varied relief on the latter. This was largely due to the courts construction of footnote 50 of the Monroe decision.[32] The courts were quick to limit Monroe to its specific factual situation and the relief prayed for.

In *Bruno*, the owners of a retail liquor establishment, were holders of tavern liquor licenses issued by the appellants. The owners were denied renewal of their one-year liquor licenses on the grounds that nude dancing conducted in the appellees bars had done more than appealed to the prurient interests of the townsfolks. Pursuant to a Wisconsin statute, the local licensing agency was authorized to grant liquor license to those persons they deemed proper to keep places within their respective towns, villages, or cities for the sale of intoxicating liquors.[33]

The local licensing agency, in this case, the License and Welfare Committee of the Common Council held a public hearing on the issue of the appellees license renewal. The appellees were present and heard oral objection to the renewal of their licenses for their taverns. The appellees were given an opportunity to speak but no speaker was sworn. None of the testimony was recorded and no verbatim transcript was made. The appellees were not advised that they could cross examine any speakers and they did not ask to do so. There were no advance written specifications of the charges against any of the bars. The Committee after the hearing made a recommendation that the appellees license be denied because of the adverse effect of the nude dancing on the community.

The appellees brought suit under 42 USC § 1983 for declaratory and injunctive relief against the cities of Racine and Kenosha, Wisconsin claiming deprivation of procedural due process arising from the cities' failure to hold full-blown adversary hearings before refusing to issue license renewals, and the unconstitutionality of the local licensing scheme. The District Court entered a temporary restraining order with a directive that licenses be issued to the appellees and convened a three judge court to rule on the constitutionality of the statutory scheme.[34] The three judge

[32] 427 F.2d at 322. *See* accompanying textual material.

[33] Each town board, village board, and common council may grant retail licenses under the conditions and restrictions in this chapter contained, to such persons entitled to a license under this chapter as they deem proper to keep places within their respective towns, villages, or cities for the sale of intoxicating liquors. No member of any such town board, village board or common council shall sell directly or indirectly or offer for sale, to any person, firm or corporation that holds or applies for any such license any bond material, product, or other matter or thing that may be used by any such licensee or prospective licensee in the carrying on of his or its said business. Wis. Stat. Ann. § 176.05

[34] All town and village boards and common councils or the duly authorized committees of such councils, shall meet not later than May 15 of each year and be in session from day to

court held that due to the equitable nature of the action it had jurisdiction pursuant to 28 U.S.C. § 1343.[35] Balancing the interest of the state in the control of liquor licensing and the appellees interest in their property and occupations, the Court held that the appellees could not be denied such interest with less than an adversary type hearing with all the procedural safeguards.

On appeal, the Supreme Court, on its own cognizance ruled on the issue of jurisdiction under § 1983 of the Civil Rights Act. (The parties had acquiesced in jurisdiction under 1983 and the lower courts had declared jurisdiction based on two Seventh Circuit decisions).[36]

The Court felt that the proposition of the two cases relied on by the three judge court, that a city is a "person" under § 1983 where equitable relief is sought, but is not a "person" under the same section where damages are prayed for, was seriously weakened by the language in footnote 50 of the decision in *Monroe v. Pape*.[37]

The federal courts had construed the language of "no inference to the contrary can any longer be drawn from those cases" to mean that no inference could be drawn that Monroe denied equitable relief against municipalities under 42 USC § 1983. In answer to this construction, Justice Rehnquist stated:

> We find nothing in the legislative history discussed in Monroe or in the language actually used by Congress, to suggest that the generic word "person" in § 1983 was intended to have a bifurcated appli-

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day thereafter, so long as it may be necessary, for the purpose of acting upon such applications for license as may be presented to them on or before April 15, and all applications for license so filed shall be granted, issued or denied not later than June 15 for the ensuing license year, provided that nothing shall prevent any governing body from granting any licenses which are applied for at any other time. As soon as an application has been approved, a duplicate copy thereof shall be forwarded to the secretary of revenue. No application for a license which is in existence at the time of such annual license meeting shall be rejected without a statement on the clerk's minutes as to the reasons for such rejection. Wisc. Stat. Ann. 176.05(8).

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[35] The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: (3) To redress the deprivation under color of any state law, statute, ordinance, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States. . . . 27 U.S.C. § 1343(3)(1964).

[36] Schnell v. City of Chicago, 407 F.2d 1084 (7th Cir. 1968) Adams v. City of Park Ridge, 293 F.2d 585 (7th Cir. 1961).

[37] Footnote 50 provided that in a few cases in which equitable relief has been sought, a municipality has been named along with city officials as defendant where violations of 42 USC section 1983 were alleged. *See* Douglas v. City of Jeanette, 319 US 157; Holmes v. City of Atlanta, 350 US 879. The question dealt with in our opinion was not raised in those cases, either by the parties or by the court. Since we hold that a municipal corporation is not a "person" within the meaning of section 1983, no inference to the contrary can any longer be drawn from those cases. 365 US 167 (1961).

cation to municipal corporations depending on the nature of the relief sought against them. Since, as the Court held in Monroe, "Congress did not undertake to bring municipal corporations within the ambit of" § 1983-365 US, at 187, 5 LEd 2d 492, they are outside of its ambit for purposes of equitable relief as well as for damages. The District Court was therefore wrong in concluding that it had jurisdiction of appellees' complaint under section 1343.[38]

BRUNO IN PERSPECTIVE

The *Bruno* decision raises some serious questions. Does the decision in effect overrule previous decision allowing equitable relief against a municipality under a "bifurcated" definition of Monroe? Does the decision invalidate § 1988 as it relates to deficiency in federal law to effect a just remedy in suits against municipalities? In decisions like the *Harkless* case where the court included back pay for the wrongful discharge of black teachers, as equitable relief, who is to pay such relief in later cases—the school board members themselves? One can envision the hardships this would impose on both parties in a large metropolitan area where hundreds of teachers may seek such recovery. Does the decision consider the reality of discriminatory acts taken by local officials at the behest of local residents?

Apparently the answers to these questions will come in later case decisions on the point.

CONCLUSION

The effect of the decision in *Bruno* is to fortify the denial of equitable relief against municipalities on the same rationale that Monroe denied recovery of damages from municipalities. The Congressional Record raises a serious question as to whether a definition of "person" was the crux of the opposition against the Sherman Amendment. If it was not, *Monroe* was wrongfully decided as was *Bruno*.

The *Monroe* decision effectively closed the door to recovery of damages against municipalities under § 1983. The decision in *Bruno* has "plugged" the crack under the door that federal courts had found by delineating between equitable relief and damages under § 1983.

Bruno ignores the fact that granting of equitable relief in many instances involves money damages and that such expenditures are necessary to give effective equitable relief, e.g., desegregation of a metropolitan

[38] 93 S.Ct. 2222 (1973).

school system. If municipalities are not "persons" under § 1983, then city officials must pay this cost. The absurdity of the decision is more than evident.

PARIS FAVORS

Double Jeopardy: Chase v. Oklahoma & Smith v. Missouri

On November 12, 1973, the United States Supreme Court denied petitions for writs of cert. in both *Chase v. State of Oklahoma*,[1] and *Smith v. State of Missouri*.[2] In both cases, the petitioners were contending that their constitutional protection against double jeopardy, as embodied in the Fifth Amendment, and applicable to the states through the Fourteenth Amendment,[3] had been violated. In both cases, there was a rigorous dissent by Mr. Justice Brennan, with whom Mr. Justice Douglas and Mr. Justice Marshall joined. The basis of the dissents was that in both cases, petitioners had been prosecuted by their respective states in separate proceedings for crimes which arose out of the same transaction or episode, in violation of the Supreme Court's ruling in *Ashe v. Swenson*.[4]

In *Chase*, the petitioner and his passengers overpowered a Deputy Sheriff and took his .38 caliber pistol after having been stopped for a routine traffic violation. Afterwards, the deputy was forced to drive to several different locations where he was further beaten. Before he was released, his wallet was taken. Chase was tried and convicted by a jury in Muskegee County, Oklahoma, for Kidnapping for Extortion and received a sentence of 35 years. Later, the state brought separate charges against petitioner for the possession of the deputy's gun. Petitioner was also convicted this second time for the offense of Carrying a Firearm, and sentenced to 10 years imprisonment. The Oklahoma Court of Criminal Appeals modified petitioner's term of imprisonment to five years, but rejected petitioner's claim that the second prosecution violated his constitutional protection against double jeopardy.

In the case of *Smith*, an apartment which was occupied by Mrs. Hermine Rohs, her son Willy Rohs, and his wife Marilyn, was forcefully entered by petitioner and one Edward Johnson. The aforementioned residents were robbed; both women were raped; and finally, all three were stabbed to death. The petitioner, Smith, was indicted on three separate charges of

[1] Frank Chase v. State of Oklahoma, 509 P.2d. 171, cert. denied, —U.S.—, 94 S.Ct. 458 (1973).

[2] Willie J. Smith v. State of Missouri, 491 S.W. 2d. 257, cert. denied, —U.S.—, 94 S.Ct. 460 (1973).

[3] Benton v. Maryland, 395 U.S. 784, (1969).

[4] Ashe v. Swenson, 399 F.2d. 40, rev'd per curiam, 397 U.S. 436, (1970).